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Supreme Court of the United States

October Term 1968

No. 884

ALFRED M. SHAFTER, as next friend of the dependents and next of kin of JOAQUIN FARINA MUNIZ, and for such other persons as may be similarly situated, such as dependents and next of kin of GEORG JOSEPH KOSTKA, GERHART RUDI RICHARD KLATT, DIETER AHRENS, KOCH LOTHAR LUDWIG WILMES, and GUNTHER SCHIKULLA, and KARL-HEINZ WEINHOLD,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent,

and

ALFRED M. SHAFTER, as next friend of the defendants, etc., et al.,

Third-Party Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT

JACOB RASSNER,
Attorney for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on October 1, 1968.

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 273 F. Supp. 152 (1967). The opinion of the United States Court of Appeals for the Second Circuit, entered October 1, 1968, is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on November 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. What was the intent of the framers of NATO-Status of Forces Agreement of June 19, 1951 (4 U.S.T. 1792) as affecting rights of third-party claimants to recover damages in or have access to United States Federal Courts for personal injuries and death resulting from maritime torts committed by a United States public vessel in German waters, and in place thereof substituting a German administrative tribunal as the exclusive forum?

2. Was it the intent of the framers of the NATO-Status of Forces Agreement of June 19, 1951 (4 U.S.T. 1792) to depart from the well-established concept of uniformity of Admiralty Law so as to authorize property damage claimants access to our Admiralty courts and to deny such access to personal injury and death claimants predicated on the same collision?

3. Was it the intent of the framers of the NATO-Status of Forces Agreement of June 19, 1951, entered into force with Germany July 1, 1963 (TIAS-5351), to nullify and revoke the rights of access to our Courts "in all degrees of jurisdiction", and fair, equitable and national treatment, as granted to German nationals by the 1954 Treaty of Friendship, Commerce and Navigation (7 UST 1839; TIAS 3953) entered into force with Germany July 14, 1956?

4. What is the interpretation, force and effect of the provisions of Article III, Section 2 of the Federal Constitution as to the exclusive authority and power of our Federal Judiciary to adjudicate maritime tort claims against

the United States, and to what extent, if any, is such exclusive authority and power subject to repeal, modification or substitution by treaty? Did the Court below correctly express the intent of the framers or erroneously introduce a concept of exclusive jurisdiction by a foreign tribunal not contemplated by said framers or encompassed within the Treaty?

Statement

The Petitioners instituted their action on the authority of the Public Vessels Act and the Suits in Admiralty Act on November 16, 1965.

The subject matter in suit treats with damages for wrongful death and personal injuries arising from a collision between the USNS BLUE JACKET, a merchant vessel of the United States and a German coastal freighter, the M/V DIRK, on February 10, 1964, on the Weser River in German territorial waters.

At the time of the collision, the BLUE JACKET was not equipped for war activities, was not involved with NATO defense maneuvers or exercises and was not carrying guns or ammunition. The BLUE JACKET was not assigned, transferred, or being operated under or by the NATO command; but, on the contrary, was at all times under the management, operation and control of the Military Sea Transport Service agency of the Respondent.

On November 3, 1965, the Defense Costs Office in Bremen, an administrative agency of the Federal Republic of Germany, after assuming jurisdiction over claims for compensation of the next of kin of the deceased seaman and the Master, as well as of the surviving crew member, dismissed all of these claims with prejudice.

The District Court Judge, Hon. Marvin E. Frankel, rejected jurisdiction over the personal injury and death

claims of the Petitioners and dismissed the complaint on July 26, 1967, on Respondent's contention that the Petitioners' rights were exclusively governed by Article VIII, Par. (5) (h) of the North Atlantic Treaty Status of Forces Agreement ("NATO-SOFA") of June 19, 1951, 4 U.S.T. 1792; and, that the remedies provided under the Public Vessels Act were not available to Petitioners and were deemed substituted by the remedial apparatus of the NATO-SOFA Agreement.

The dismissal was based on the provisions of Article VIII Par. (5) (h) of the NATO-SOFA Agreement which reads as follows:

> "Except in so far as sub-paragraph (e) of this paragraph applies to claims covered by paragraph 2 of this Article, the provisions of this paragraph shall not apply to any claim arising out of or in connection with the navigation or operation of a ship or the loading, caarriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply."

The wrongful death actions predicated on the loss of life of the Master and five crewmen, and for the personal injuries of the surviving seaman were dismissed. However, jurisdiction was retained over the causes of action by the administrator of the Master's estate and the British, Danish and German underwriters based on the loss of the M/S/ DIRK and property damages (U.S.D.C., S.D.N.Y., 66 Ad. 132); and, there is still pending a libel for damages to the USNS BLUE JACKET, which was filed by the Respondent United States against the Petitioner, the administrator of the Master's estate as well as against the Danish, British and German underwriters as co-defendants (U.S.D.C., S.D.N.Y., 66 Ad. 477).

The Court below adopted as conclusive the decisions by the claims authorities in Germany that the Petitioners' claims were governed and barred by the administrative

plan or scheme as provided by Article VIII of the NATO-SOFA Agreement; and, held that Article VIII *pro tanto* constituted a revocation and substitution of a German tribunal for the exclusive authority granted by Congress to our Federal Judiciary under our Constitution.

There was no finding by the claims authorities in Germany respecting Petitioners' rights under the Public Vessels or Suits in Admiralty Acts, but it was decided that the Petitioners' claims were cognizable under the NATO-SOFA Agreement, and maintainable in Germany exclusively. There was no hearing on the merits.

The United States Circuit Court of Appeals for the Second Circuit affirmed the summary judgment of the District Court on November 6, 1968 (docketed November 8, 1968), but without opinion.

Reasons for Granting the Writ

1. The Court below has promulgated a concept of law which is in violation of the provisions of Article III, Section 2 of the United States Constitution, in that the exclusive Admiralty jurisdiction, reserved to our Federal Judiciary, has been erroneously delegated to a foreign administrative tribunal.

2. The Court below has promulgated a concept of law which is in violation of the provisions of Article III, Section 1 of the United States Constitution in that the exclusive authority of Congress over the jurisdiction of our Federal Courts has been erroneously circumvented.

3. The Court below has promulgated a concept of law which constitutes not only a radical departure from our American concept of fundamental justice, which guarantees to litigants a trial on the merits, but it has also erroneously interpreted the provisions of Article VIII of the NATO-

SOFA Status of Forces Agreement of June 19, 1951 (4 UST 1792) in a manner which has the effect of enacting maritime laws by treaty, a sphere which, by Article I, Sec. 8 of our Constitution has been reserved exclusively to the Congress of the United States.

4. Petitioners have been denied access to our Courts, and fair, equitable and national treatment in violation of the Treaty of Friendship, Commerce and Navigation (7 UST 1839, TIAS 3593) entered into force with the Federal Republic of Germany on July 14, 1956. The 1954 Treaty of Friendship, Commerce and Navigation has been violated and the Petitioners have been deprived of rights guaranteed to them thereunder in addition to their rights under our United States Constitution.

5. The Court below has erroneously interpreted the provisions of Article VIII of the NATO-SOFA Status of Forces Agreement of June 19, 1951 (4 UST 1792) as nullifying the remedial benefits granted pursuant to the Suits in Admiralty and Public Vessels Acts whereas there exists no word, intent, or legal authority therefor.

6. This matter brings into focus the serious question concerning the rights of foreign nationals in all countries where NATO operates to establish and determine to what extent, if any, remedial benefits available to American citizens, pursuant to the provisions of the Public Vessels Act, are available to an alien injured by a United States vessel in foreign countries.

7. It is fair and reasonable to conclude from the travaux préparatoires of NATO-SOFA that the framers thereof never intended to include private maritime claims within the purview of the NATO-SOFA Agreement of June 19, 1951. Nor did said Agreement contain any words of reference regarding the exclusive jurisdiction by any receiving signatory state over such maritime claims to the exclusion of the courts of the sending state.

8. The dismissal of the claims of the Petitioners, on the basis of the Lower Court's interpretation of the NATO-SOFA Status of Forces Agreement, sets a precedent for and results in an amendment of the Constitution unauthorized by Article V thereof.

9. An interpretation of NATO-SOFA which substitutes for the exclusive jurisdiction of our Federal Courts over claims in Admiralty reserved by our Constitution to Congress raises a vital question respecting rights of Petitioners herein and of all other maritime claimants, which merits consideration and adjudication by this Honorable Court, and a petition for granting a writ of certiorari appears to be justified.

POINT I

The decision by the Court below is in conflict with and violation of provisions of Article I Section 1 and Article III Section 1 of the Federal Constitution.

Jurisdiction of the Federal Court was erroneously declined as there exists no authority, save the Congress of the United States to ordain the jurisdiction of Federal Courts, other than the Supreme Court.

Fitzsimmons v. *Yeager,* 391 F. 2d 849 (1968).

The legislative power reserved to the Congress by our Constitution cannot be usurped by means of a treaty provision as was done in the instant case on the authority of NATO-Status of Forces Agreement, Article VIII.

The Public Vessels and Suits in Admiralty Acts came into being by Acts of Congress based on its exclusive legislative powers, as provided by Article I, Section 1 of the Constitution of the United States.

The erroneous interpretation by the Court below of Article VIII of NATO-SOFA establishes a concept whereby legislation which is exclusively reserved to Congress is accomplished by Treaty contrary to our Constitution.

The exclusive power of Congress would be usurped through the medium of the NATO-SOFA Agreement. Such procedure has been condemned by our Courts as clearly stated in the case of *American Dredging Co.* v. *Local 25, Marine Div., Int. U. Op. Eng.*, 338 F. 2d 837 (1964), at page 850:

> "The Constitution of the United States has reserved to the Congress the power to legislate. Article I, section 1 provides that 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives'.
>
> Not even the Supreme Court of the United States can usurp the legislative power reserved to the Congress by the Constitution. The Supreme Court itself has time and again paid homage to the doctrine of the separation of powers decreed by the Constitution and declared that judicial legislation is abhorrent to, and in violation of the Constitutional scheme."

Our Federal Courts derive their jurisdiction wholly from the authority of Congress under Article III Section 1 of the Constitution. The Public Vessels and Suits in Admiralty Acts are based upon said authority.

Authority for ordaining a foreign claims tribunal with jurisdiction over claims arising out of a collision caused by a United States vessel is completely lacking.

Any provision which purports to confer such jurisdiction without an act of Congress is completely void.

The following quotation appears in the case of *Fitzsimmons* v. *Yeager, supra,* at page 859:

> "Independent of this consideration, is the further critical inescapable fact that the Congress of the United States, and it alone, can ordain the jurisdiction of federal courts, other than the Supreme Court of the United States.
>
> All federal courts, other than the Supreme Court, are established by Congress under Section 1 of Article III of the Constitution. They derive their jurisdiction wholly from the authority of Congress as explicitly expressed in legislative enactment and Congress may restrict conferred jurisdiction at its discretion. Kline v. Burke Construction Co., 260 U.S. 226, 233-234, 43 S.Ct. 79, 67 L.Ed. 226 (1922), and the cases therein cited."

The rights having come into existence through legislation by Congress, common sense and basic justice is violated by any attempt to nullify such rights through any other means than by comparable and appropriate act of Congress.

Fitzsimmons v. Yeager, supra.

Our Admiralty Courts having been vested with jurisdiction in an action predicated upon a collision caused by a United States vessel, any shifting of jurisdiction or change in the remedial provisions of the Public Vessels Act, without an Act of Congress, is illegal and therefore void.

This has been clearly expressed in the case of *American Dredging Co.* v. *Local 25, Marine Div., Int. U. Op. Eng., supra,* at page 850:

> ***"The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for lawmakers, not law interpreters."***

POINT II

The NATO-Status of Forces Agreement of 1951 has been erroneously construed and interpreted by the Court below that the said agreement vested exclusive jurisdiction in German authorities over claims against the United States for personal injury and death involving the merchant vessel USNS Blue Jacket.

The Travaux Préparatoires of the NATO-SOFA Agreement, Article VIII (5) (h) thereof and the drafts and records of deliberations by its framers establish that their purpose and intent was to preserve the rights of private third parties in maritime clain without exception.

A careful study of the legislative history of the Treaty in a volume entitled INTERNATIONAL LAW STUDIES—NATO AGREEMENTS ON STATUS: TRAVAUX PRÉPARATOIRES, edited and annotated by Professor Joseph M. Snee, S.J., Professor of Law, Georgetown University Law Center,* supports and confirms the view that the maritime claims of private third parties were not within the contemplation of the Treaty.

The Status of Forces Agreement with which we are concerned was the first of three NATO agreements on Status and the only one that we are concerned with herein. On January 23, 1951 (D-D 151) 23 p. 345, the United States submitted the first draft of the agreement which was based on the earlier agreement relative to the status of members of the armed forces of the Brussels Treaty Powers and which had previously been agreed to by five of the twelve NATO countries, Belgium, France, Luxembourg, the Netherlands and the United Kingdom (p. 311).

The draft submitted by the United States did not repeat or include Article VIII par. 2(a) of the Brussels Treaty (p. 336) which reads as follows:

"2. The provisions of this Article do not apply to:

(a) Maritime salvage claims against a vessel used in connection with the Brussels Treaty or claims

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* Page references are to Snee's text.

> against such a vessel for damage caused by colsion. These claims will be brought against the authorities of the Party to whom the vessel belongs".

On February 15, 1951: (MS (J)—R (51) 3, p. 95, the juridicial sub-committee met and considered Article VII, par. 1 (p. 349) of the draft submitted by the United States with relation to maritime claims as agreed to in the last sentence of paragraph 2 (a) of the Brussels Treaty, *supra*, p. 336 as follows:

> "These claims will be brought against the authorities of the Party to whom the vessel belongs."

The committee that composed and framed the sentence had recognized that the question as to which courts would have jurisdiction was without the scope of the agreement and that the question of jurisdiction was within the province or contemplation of the conventions then in existence, including the provisions of the International Convention at Brussels of April, 1926.

Claims in respect to maritime damages were specifically excluded from Article VIII of the Western Union Agreement. (Brussels Treaty, p. 336); to which the last sentence of Article VIII, par. 2 (a) above quoted referred. Furthermore, in the present text proposal by the United States, Mr. G. W. Lambert, of the United Kingdom, Chairman of the juridical sub-committee, proposed that the word "claimant" should be deleted from Article VII, par. 4 (a) (predecessor to the final draft of Article VIII, par. 5 (h)), since it was irregular and restricted the rights of claimants, and the deletion of the words "the claimant" resulted in confining the claims procedure to the claims for damages as between the contracting parties and individual members of their forces (p. 97).

Therefore it is clear from the foregoing that the rights of private individuals as to their choice of forum was always intended to be preserved.

It was agreed to amend Article VII to make it applicable only t state vessels; and, also, to specify the definition of "State vessel".

The Chairman proposed to prepare a redraft of this Article in the light of the changes and comments had thereon pertaining to maritime damages.

All through the negotiating history of the aforesaid paragraphs of Article VIII of the Status of Forces Agreement, and incorporated in every draft proposal thereof, prior to the final agreement, the clear intent of the framers respecting the rights of the claimants herein is plainly set forth in the following paragraph:

> "The provisions of this paragraph shall not apply to any claim arising out of or in connection with the navigation or operation of a ship or the loading carriage, or discharge of a cargo."

DMS-D (51) 11 R, p. 401; MS-D (51) 11 (2R), p. 416; D-D (51) 57, p. 438.

On April 9, 1951, the United States draft proposal MS-D (51) 20, page 464, was submitted with the following reference to amend Article VIII, pp. 466, 467:

"17. Strike the second subparagraph of paragraph 4(f), and add to paragraph 4 the following provisions:

> (g) Each Contracting Party will assume, process, and pay all claims of its nationals, including vessels flying its flag, for damages arising out of any maritime incident, including damage by vessels to land structures, caused by the public vessels of any other Contracting Party, wherever such claims for damages may arise.

The assumption of claims, arising out of any maritime incident, shall apply and be paramount in any situation where any vessels involved shall be engaged in any activity connected with or arising out of the operation of the North Atlantic Treaty, including situations where the other vessel or damaged property is not being utilized in connection with the North Atlantic Treaty.

The representations of any Contracting Party involved, as to what vessels are its public vessels and whether they are engaged in any activity arising out of the North Atlantic Treaty, shall be conclusive.

The cost incurred in the assumption of claims involving maritime incidents shall be distributed between the Contracting Parties in the same manner as is specified for the distribution of assumed claims under paragraph 4 of this Article. The State of which the claimant is a national shall be considered the "receiving State."

The nationals of a "receiving State" shall, in any maritime incident where the receiving State is obligated by this Agreement to assume and process the claim arising out of the maritime incident, have no right of action in the courts of any other Contracting Party arising out of such incident."

On April 20, 1951 (MS-R (51) 11 p. 152) the committee headed by Mr. W. V. J. Evans of the United Kingdom met to discuss among other things, the aforesaid United States proposal to amend Article VIII.

The United States Representative explained that his Government felt that it would be desirable to attempt to lay down some kind of procedure to cover maritime claims made by third parties. Objections to the United States proposal were voiced by all the representatives of the various NATO countries, including Chairman Evans, representing the United Kingdom; and, "it was finally pointed out

that the proposal by the United States was in conflict with international law and international agreements, and for that reason alone could not be accepted". (p. 154)

The United Kingdom amendment as proposed was accepted as contained in (MS-D (51) 22, p. 472 par. 9), where, for the first time, the words of Article VIII(5)(h) in question herein, were first incorporated, and appear as follows:

> "9. It is suggested that the second sentence of paragraph 4(f) should become subparagraph (g) with the addition, after the words 'discharge of cargo', of the words 'other than claims for death or personal injury to which paragraph 4 above does not apply".

The views of Chairman Evans were as follows:

> "10. The Chairman said that in his view the procedure proposed in the additional paragraph was impracticable. For example, if a passenger vessel, carrying several hundred passengers belonging to say twenty or thirty nations, was sunk by a NATO vessel as a result of collision, the application of the paragraph would mean innumerable actions for damages being taken in all the various countries concerned, in accordance with their own particular laws. The members of the Shipping Company, for instance, could not possibly be represented at all these actions".

Clearly, it was the intent and purpose of the framers, by the rejection of the United States draft proposal, to preserve the fundamental right of a claimant to his choice of forum in the courts of the authorities of the party to whom the offending vessel belonged.

Mr. Evans, Chairman of the working group, stated (p. 211, par. 29), that two parties to a multilateral agreement were free to conclude a bilateral agreement, on condition that the latter did not prejudice the interests of third parties.

On May 29, 1951 (MS-R (51) 19, p. 211), the working group considered draft D-D (51) 127 of May 7, 1951, p. 533, and took up the further questions raised, at which time the United States representative inquired as to the first clause of sub-paragraph 5 (h), which was to have been deleted and asked why it had been retained.

The Chairman on p. 213, par. 14, explained that paragraph 2 of Article VIII applied to cases, among others, of damage arising out of the use of a ship or the loading or discharge of a cargo. Damage caused in such circumstances to goods which were the property of a contracting party was covered by this paragraph. Damage caused in the same circumstances to the property of third parties, other than the contracting parties, were not covered by paragraph 5 of Article VIII.

On May 30, 1951, MS-R (51), 20, p. 215, the working group in committee again considered the draft agreement D-D (51) 127 of May 7, 1951 and, with regard to Article VIII, par. 4, 5 and 5(h) concluded the following (p. 215):

> "Summary Record of a Meeting of the Working Group of Status, 30 May 1951
>
> I. Consideration of Draft Agreement.
>
> 1. The Italian Representative stated that his Government withdrew the proposed amendment to Article VIII, paragraph 5.
>
> Article VIII, par., 5(h)
>
> 2. In reply to a question put by the United States Representative, the Chairman explained that it was clear that paragraph 4 applied to claims of Contracting Parties and paragraph 5 to claims of individuals. The last clause of paragraph 5 (h), which reads as follows: 'other than claims for death or personal injury to which paragraph 4 of this Article does not apply', was therefore not strictly necessary. It had seemed advisable, however, to retain this clause in order to avoid any possible ambiguity' (pp. 215, 216)."

The said clause was retained by the framers of the agreement in order to avoid any possible ambiguity as to the nature of the claims; whether said claims constituted claims by the contracting parties and/or by individual members of their forces; and, therefore, had nothing to do with maritime claims of private persons or claims by third parties. The comments by the Chairman that the last clause of said paragraph, "was therefore not strictly necessary", substantiates the position of the petitioners; for, if the clause is omitted from consideration it will be clear that the private maritime claims and rights of the claimants herein fall outside the purview of the NATO-SOFA Agreement and are rightly within the jurisdiction of the District Courts of the United States.

The clearly expressed and unmistakable intent of the framers of the agreement as shown in their debates and deliberations was to preserve all existing rights of private persons, and not a single word can be found which would justify the belief that there ever was any consideration given or intent expressed by them that any of the existing laws or provisions of the remedial statutes here involved be affected and/or claimants' rights thereunder be abridged.

Article VIII of the NATO-SOFA Agreement was an administrative procedure supplementing the Treaty only for the settlement of claims, which included the torts, of members of our armed forces stationed in Germany.

All maritime claims of private third parties were completely excluded and did not come within the scope or purview of the NATO/SOFA Agreement.

In an official Department of the Army pamphlet interpreting Article VIII(5)(h) of NATO-SOFA, the following excerpt appears:

> "Contractual claims of third parties are not cognizable under Article VIII, and neither are third-party claims of a maritime nature."
>
> Department of the Army Pamphlet 27-162: "Claims", January, 1968, p. 96.

The intent and purpose of the framers of Article VIII, (5) (h), *supra*, was clearly expressed, confined to and entirely based upon the self-same reservations as contained in Article VIII (par. 2a) of the aforesaid Brussels Treaty Powers agreement, as quoted *supra*, (p. 336), respecting the rights of all maritime claimants without exception, and nothing in the record of the deliberations of the framers and/or the draft proposals involved therein can be pointed to or exists to the contrary, whereas the record is replete with objection to and rejection by the representatives of all the NATO countries of any encroachment upon or restriction of the maritime rights of all private third party claimants as specifically reserved by the said Brussels Treaty Powers Agreement.

There is therefore, no legal barrier to the Petitioners herein pursuing their legitimate claims under the legal remedies as provided by the Public Vessels Act, particularly in view of the fact that their initial claims have been rejected by German administrative authorities with prejudice, and their fundamental rights to a competent judicial determination of their claims have been foreclosed.

As was held in *Lockerty* v. *Phillips*, 319 U.S. 182, 188; 63 S. Ct. 1019, 1023, 87 L. Ed. 1339:

> "[a] Construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored."

In the case of *United States* v. *Robel*, 88 S. Ct. 419 (1967) p. 431, this Honorable Court first held:

> "The need for a legislative judgment is especially acute here, since it is imperative when liberty and the exercise of fundamental freedoms are involved that constitutional rights not be unduly infringed. Cantwell v. State of Connecticut, supra, 310 U.S., at 304, 60 S.Ct., at 903. Before we can decide whether it is an undue infringement of protected rights to send a person to prison for holding employment at

> a certain type facility, it ought at least to appear that Congress authorized the proscription as warranted and necessary. Such congressional determinations will not be assumed. 'They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized * * * but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.' Greene v. McElroy, supra, 360 U.S., at 507, 79 S.Ct., at 1419."

Secondly, in *Watkins* v. *United States*, 354 U.S. 178, 205; 77 S. Ct. 1173, 1188, 1 L. Ed. 2d 1273, this Honorable Court held:

> "*Second.* We said in Watkins 1. United States, 354 U.S. 178, 205, 77 S.Ct. 1173, 1188, 1 L.Ed.2d 1273, that Congress must take steps to assure 'respect for constitutional liberties' by preventing the existence of a 'wide gulf between the responsibility for the use of * * * power and the actual exercise of that power.' Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460; Marcus v. Search Warrants of Property, etc., 367 U.S. 717, 730, 81 S.Ct. 1708, 1715, 6 L.Ed.2d 1127; A Quantity of Copies of Books v. State of Kansas, 378 U.S. 205, 213, 84 S.Ct. 1723, 1727, 12 L.Ed.2d 809 even when Congress acts pursuant to its 'great powers,' Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164, 83 S.Ct. 554, 565, 9 L.Ed.2d 644. Without procedural safeguards, regulatory schemes will tend through their indiscriminate application to inhibit the activity involved. See Marcus v. Search Warrants of Properties, etc., supra, 367 U.S., at 734-735, 81 S. Ct., at 1717-1718."

Our Supreme Court has consistently held that when the meaning of a treaty provision is ambiguous or uncertain, recourse may be had to the negotiations and diplomatic

correspondence of the contracting parties relating to the subject matter and to their own practical construction.

Nielsen v. *Johnson,* 279 U.S. 47;
Arizona v. *California,* 292 U.S. 341;
U. S. v. *Am. Trucking Ass'n, Inc.,* 310 U.S. 534;
Block v. *Compagnie Nationale Air France,* 386 F. 2d 323.

The rule is unquestioned that the validity and construction of a treaty lies within the jurisdiction of the Supreme Court.

B. Altman & Co. v. *U.S.,* 224 U.S. 583.

POINT III

Remedial rights provided by the Public Vessels and Suits in Admiralty Acts have been erroneously denied by the lower court to all nationals by signatory nations to the NATO-Status of Forces Agreement of June 19, 1951.

The law seems well settled that Petitioners were entitled to access to our Federal Courts.

United States District Courts have jurisdiction over admiralty controversies between foreigners, which arise outside the United States. U.S. Const. art. III, § 2; The Belgenland, 114 U.S. 355, 365, 5 S.Ct. 860, 29 L.Ed. 152 (1885); Canada Malting Co. v. Paterson Steamships Ltd., 285 U.S. 413, 420, 52 S.Ct. 413, 76 L.Ed. 837 (1932); Lauritzen v. Larsen, 345 U.S. 571, 575, 589-590, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); see 1 Benedict, Admiralty §§ 82-84 (6th ed. 1940).

POINT IV

Access to our Courts and fair, equitable and national treatment have been denied in violation of the 1954 Treaty of Friendship, Commerce and Navigation (7 UST 1839, TIAS 3593) and in a manner which is repugnant to the American concept of justice that every litigant be afforded his day in court on the merits.

Articles I, IV, VI, XVII, par. 2 of the 1954 Treaty of Friendship, Commerce and Navigation granting Petitioners, German nationals, reciprocal rights of access to our Courts, fair, equitable and national treatment have been totally disregarded by the Lower Court in its decision.

This constituted violations of covenants in a solemn pact and treaty with a friendly sovereign nation and a deprivation of Petitioners' reciprocal constitutional rights, including due process of law vouchsafed to Petitioners by the provisions of said Treaty and by the Constitution of the United States. *Barbier* v. *Connally,* 113 U.S. 27; *Sardino* v. *Federal Reserve Bank of New York,* 361 F. 2d 106.

Conclusion

The Court below erroneously read into the NATO-SOFA Agreement provisions not contained therein by specific wording, intent or by inference affecting the exclusive jurisdiction of our Federal Courts over maritime claims.

The jurisdiction of our Federal Courts to adjudicate claims against the United States predicated on torts committed by United States vessels was not repealed, modified or substituted either directly or by inference in the Agreement.

Nothing contained in any of the NATO-SOFA provisions justifies the conclusion reached by the Court below that the foreign claims commission was clothed with exclusive authority to pass on such claims to the exclusion of our Federal Courts.

The signatories to the Treaty did not have any legal authority to treat with the question of jurisdiction of our Federal Courts, legislation over which is specifically reserved by our Constitution to Congress.

The fact that provisions not contained in the NATO-SOFA Agreement have erroneously been read into the Treaty by the Court below, has created an erroneous and radical concept of law, in direct conflict with the provisions of our Constitution and with international maritime law which calls for correction by this Honorable Court and merits the granting of the petition for a writ of certiorari.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioners

APPENDIX

Judgment of Affirmance of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of October one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

ALFRED M. SHAFTER, as next friend of the dependants and next of kin of JOAQUIN MUNIZ, and for such other persons as may be similarly situated, such as dependants and next of kin of GEORG JOSEPH KOSTKA, GERHART RUDI RICHARD KLATT, DIETER AHRENS, KOCH LOTHAR LUDWIG WILMES and GUNTHER SCHIKULLA and KARL-HEINZ WEINHOLD,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against appellants.

A. DANIEL FUSARO
Clerk

(SEAL)

A true copy,
A. DANIEL FUSARO
Clerk

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FILED
DEC 23 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term 1968

No. 884

ALFRED M. SHAFTER, as next friend of the dependents and next of kin of JOAQUIN FARINA MUNIZ, and for such other persons as may be similarly situated, such as dependents and next of kin of GEORG JOSEPH KOSTKA, GERHART RUDI RICHARD KLATT, DIETER AHRENS, KOCH LOTHAR LUDWIG WILMES, and GUNTHER SCHIKULLA, and KARL-HEINZ WEINHOLD,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER
Attorney for Petitioners
15 Park Row
New York, N. Y. 10038
212—227-2618

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(APPENDIX)

Opinion and Order of Frankel, *D. J.*

On February 10, 1964, an American Government vessel, the USNS Blue Jacket, collided with a fishing boat, the M/V Dirk, on the Weser River in the territorial waters of the Federal Republic of Germany. Six members of the Dirk's seven-man crew were killed; the seventh survived, but suffered physical injuries. In this lawsuit, brought on November 16, 1965, by the surviving crew member and a representative of those whose lives were lost, recovery is sought from the United States under the Public Vessels Act, 46 U.S.C. §781 *et seq.* for the pain, suffering, and other damages attendant upon the deaths and personal injuries.[1] The Government has moved for summary judgment dismissing the suit, asserting that the matter has been withdrawn from the court's subject-matter jurisdiction by the provisions of the North Atlantic Treaty Status of Forces Agreement ("NATO-SOFA") of June 19, 1951, 4 U.S.T. 1792, to which the Federal Republic of Germany acceded by a Supplementary Agreement of August 3, 1959, effective July 1, 1963, 14 U.S.T. 531. Those treaty arrangements, the Government contends, create a comprehensive and exclusive scheme for adjudication and settlement of claims within their purview. The argument appears to be clearly correct. The only question initially creating some doubt as to whether the motion should be granted is whether the Blue Jacket, at the time of the disaster, was part of a "force" governed by the provisions of NATO-SOFA.

I.

Article VIII, paragraph 5 of NATO-SOFA provides in pertinent part (4 U.S.T. at 1806-08):

> "Claims * * * arising out of acts or omissions of members of a force or civilian component done in

the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, * * * shall be dealt with by the receiving State in accordance with the following provisions:—[2]

"(*a*) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.

"(*b*) The receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency.

"(*c*) Such payment, whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Contracting Parties.

"(*d*) Every claim paid by the receiving State shall be communicated to the sending States concerned together with full particulars and a proposed distribution in conformity with subparagraphs (e) (i), (ii) and (iii) below. In default of a reply within two months, the proposed distribution shall be regarded as accepted.

"(*e*) The cost incurred in satisfying claims pursuant to the preceding subparagraphs and paragraph 2 of this Article shall be distributed between the Contracting Parties, as follows:—

"(i) Where one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 per cent. chargeable to the receiving State and 75 per cent. chargeable to the sending State.

"(ii) Where more than one State is responsible for the damage, the amount awarded or adjudged shall be distributed equally among them; however, if the receiving State is not one of the States responsible, its contribution shall be half that of each of the sending States.

"(iii) Where the damage was caused by the armed services of the Contracting Parties and it is not possible to attribute it specifically to one or more of those armed services, the amount awarded or adjudged shall be distributed equally among the Contracting Parties concerned: however, if the receiving State is not one of the States by whose armed services the damage was caused, its contribution shall be half that of each of the sending States concerned.

"(iv) Every half-year, a statement of the sums paid by the receiving State in the course of the half-yearly period in respect of every case regarding which the proposed distribution on a percentage basis has been accepted, shall be sent to the sending States concerned, together with a request for reimbursement. Such reimbursement shall be made within the shortest possible time, in the currency of the receiving State.

"(*f*) In cases where the application of the provisions of sub-paragraphs (b) and (e) of this

paragraph would cause a Contracting Party serious hardship, it may request the North Atlantic Council to arrange a settlement of a different nature.

"(*g*) A member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties.

"(*h*) Except in so far as sub-paragraph (e) of this paragraph applies to claims covered by paragraph 2 of this Article, the provisions of this paragraph shall not apply to any claim arising out of or in connexion with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply."

Two conclusions follow for the present case from the foregoing treaty language:

(1) If the wrongs alleged arose out of "acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible," the claims of the "third parties" suing here were subject to adjudication or settlement by the Federal Republic of Germany under its applicable law and procedure.

(2) The jurisdiction thus created would displace the remedy plaintiffs invoke under the Public Vessels Act.

Plaintiffs assail both these propositions with arguments of variable substance.

First, they stress that the Government has not questioned the jurisdiction of this court under the Public Vessels Act to consider the claims for property damage arising out of the same collision. Not only is it anomalous, they argue, to distinguish death and personal injury claims from suits for harm to property; more importantly, they urge, the Government's acknowledgment of jurisdiction over the pending property-damage cases is required by the relevant treaty language and is likewise required in this case. For this contention plaintiffs repeatedly, in their brief and other papers, quote from paragraph 5(h) of Article VIII, ending the quotation just before the words italicized here (4 U.S.T. at 1808):

> "[With immaterial exceptions,] the provisions of this paragraph shall not apply to any claim arising out of or in connexion with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, *other than claims for death or personal injury* to which paragraph 4 of this Article does not apply."[8]

It is unnecessary to linger over the fallacy plaintiffs propose beyond recording the court's strong disapproval of such truncated and misleading quotations.

As to the point that jurisdiction of a foreign State under NATO-SOFA should be deemed to preclude the remedy they invoke, plaintiffs appear to urge that this would effect an impermissible "repeal by implication." This argument is not frivolous, but it must in the end be rejected. There is no doubt that the later provisions of NATO-SOFA are to be harmonized so far as possible with those of the Public Vessels Act. It seems equally clear that the specific and detailed remedial apparatus under the later treaty

should be deemed to substitute *pro tanto* for the general consent to suits under the statute. In giving its assent to NATO-SOFA, the Senate noted specifically both the benefits and the burdens of the jurisdictional agreement. It was observed that disposition of third-party claims by the Government of the place where the asserted wrong occurred (normally the country of the claimant's citizenship or residence, as in the case of the claimants here) would promote fairness, ease friction, and, incidentally, be likely to result in awards against the United States more modest than those commonly recovered in American courts. It was mentioned approvingly that 25% of such awards would be borne under the treaty by the receiving State. And it was recognized that the United States was undertaking the same jurisdictional burdens, and procuring the same benefits, for American citizens injured by foreign NATO forces stationed in this countryy.[4] Cf. *Robertson* v. *United States,* 294 F.2d 920 (D.C. Cir. 1961).

Implementing the treaty arrangement, the Congress has made specific provision for the appropriation of funds with which the Secretary of Defense is to reimburse foreign Governments for our share of awards on claims of the kind in question. Act of September 7, 1962, Title I, § 113(a), 10 U.S.C. § 2734a.

It seems clear, then, that the specific provisions of NATO-SOFA should be read to exclude the concurrent and inconsistent jurisdiction plaintiffs invoke under the Public Vessels Act. *Hijo* v. *United States,* 194 U.S. 315, 324 (1904); cf. *Tag* v. *Rogers,* 267 F.2d 664 (D. C. Cir. 1959), *cert. denied,* 362 U.S. 904 (1960).

Resisting this conclusion, plaintiffs' counsel states in an affidavit opposing the Government's motion (p. 12) that "a denial of the right of these decedents' claimants • • • to prosecute their claims in the jurisdiction of this Court would be tantamount to a wanton, arbitrary, willful, unwar-

ranted, and unlawful denial of due process and equal protection of the laws in violation of the Fourteenth (XIV) Amendment of the Constitution * * *."[5] The reference to the Fourteenth Amendment is not the foremost among the errors in this hyperbolic sentence. There is nothing unfair or irrationally discriminatory in recognition by our Government of exclusive jurisdiction in a civilized foreign State over disputes concerning events and people within the territory of that State. Cf. *Wilson* v. *Girard*, 354 U.S. 524 (1957); *Reid* v. *Covert*, 354 U.S. 1 (1957); *Toth* v. *Quarles*, 350 U.S. 11 (1955).

II.

There remains the question which appeared at the outset to be one of probable substance: whether there is or can be any genuine issue of fact concerning the status of the ship Blue Jacket as part of a treaty "force" so as to leave a meaningful doubt that the provisions of NATO-SOFA are applicable.

It is interesting if not decisive that both the present claimants and agencies subrogated to their interests proceeded, before the institution of this lawsuit, on the premise that NATO-SOFA governs the matter. Representatives of the deceased crew members and the surviving plaintiff Weinhold all filed claims with the Defense Costs Office in Bremen, an administrative tribunal of first instance, for damages incurred in the collision. Similarly, two German social insurance carriers, as subrogees on account of compensation payments they were (and are) making to the next of kin and the surviving crew member, sought indemnity from that agency. In each instance, the German tribunal took jurisdiction, considered the claims on their merits, and rejected them, holding *inter alia*, that the collision had been caused solely by improper navigation of the Dirk. German law provides for court review of those rulings. The two insurance carriers are following

that course. The individual claimants, having determined to transfer their efforts to this court, have abandoned their German proceedings following the adverse adjudications at the first level.[6]

Still weightier on the jurisdictional issue is the fact that the American authorities responsible for administering such problems and the "competent tribunal" in Germany were in agreement that the matter lay within the authority of the latter agency. As a result of those concurrent determinations, the United States became bound under the treaty, Article VIII (*e*), to pay 75% of any awards the German decision might order, and the German Government rendered itself liable for the remaining 25%. Quite apart from these conclusive practical consequences, "the meaning given [to treaties] * * * by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961).

Nevertheless, the court has gone on plaintiffs' premise that it must determine for itself the jurisdictional issue posed by the Government's motion. *Ibid.*, cf. *Robertson* v. *United States*, 294 F.2d 920, 922-23 (D.C. Cir. 1961).[7]

Here, plaintiffs argued, we encounter the triable issue mentioned earlier: whether the Blue Jacket was "in fact" part of a NATO "force" at the time of the collision. Supporting the affirmative of this question, the Government's initial papers supplied imposing support for the view on which both the German and American authorities have proceeded. The pertinent treaty definitions, the Government emphasized, describe a "force" to include the "land, sea or air armed services of one Contracting Party when in the territory of another Contracting Party * * * in connexion with their official duties * * *." NATO-SOFA Art. I, par. 1(*a*). And the definitions sensibly contemplate that a "force" may be "stationed" in the territory of a receiving State "or passing in transit * * *." *Id.*, subpar. (*e*).

Building upon these definitions, the Government has demonstrated the following undisputed facts: The Blue Jacket was at all material times a ship of the United States Navy, operated under Navy Department jurisdiction by the Military Sea Transportation Service (MSTS). Her master and crew were civil service employees of MSTS. At the time of the incident in question, and for some years before, the ship was engaged in regular voyages from Norfolk, Virginia, to Bremerhaven, Germany, carrying cargoes of frozen and chilled foodstuffs for discharge by the U. S. Army and distribution to NATO military and civilian personnel. Because Article 57 of the Supplementary Agreement governing NATO forces in Germany (14 U.S.T. 531, 597) confers a right of passage to NATO "forces" and "civilian components," the Blue Jacket entered German waters on these voyages merely upon the giving of notice, without the diplomatic clearance normally obtained for non-NATO vessels.

On these facts, as noted earlier, both the U.S. Army Claims Office in Germany and the German Defense Costs Office concluded that exclusive jurisdiction over the present claims for death and personal injury resided with the latter agency.

In opposition to the Government's showing, the plaintiff Shafter, who appears also as co-counsel for plaintiffs, made an affidavit reporting conferences and a personal inspection aboard the Blue Jacket on November 28, 1964. At that time, at least, Mr. Shafter swore (p. 2), the Blue Jacket "was not a vessel under the NATO Command as it did not have the NATO insignia, the letter 'N' required to be placed on the exterior of the vessel on all vessels under the NATO Command." Upon oral exploration of this assertion, however, it proved to be baseless, and it has been withdrawn. It is undisputed that under Article 10 of the Supplementary Agreement (14 U.S.T. at 547-48), vessels "used by a force" in the Federal Republic of

Germany must "bear a distinctive *nationality mark*, in addition to a registration number or other appropriate identification mark." (Emphasis added.) It is also undisputed that the Blue Jacket bore such markings. Since there was no ground for the claimed requirement of a letter "N," the absence of such a symbol, contrary to the initial Shafter affidavit, is immaterial.

Apart from their abandoned notion about the letter "N," plaintiffs offered nothing in opposition that could have been deemed to create or indicate a genuine issue as to any material fact. Plaintiffs pressed, however, the plausible argument that the pertinent information about the Blue Jacket was peculiarly available to, and lodged with, the Government. They contended that the case could not be deemed appropriate for decision without a trial until they had exhausted intra-government sources of possibly material knowledge.

Out of the abundant caution appropriate when the right to try real factual issues is at stake, the court ordered, and the parties agreed upon, a program of discovery. Pending completion of these inquiries, decision on the motion was postponed. In the event, however, the claimed need for further discovery proved to be extremely modest. Foregoing additional deposition testimony from the Blue Jacket's master, for which they had asserted some necessity on the argument of the motion, plaintiffs settled for a stipulation that:

> (1) there are "no special documents, telegrams, etc., which state specifically that the Blue Jacket was assigned to NATO other than those papers previously submitted by the Government in its motion papers;" and (2) the Blue Jacket "was owned and operated by MSTS and received its sailing orders from that agency."

These propositions were undisputed even before the stipulation.

The facts so stipulated are said, nevertheless, to render substantial plaintiffs' argument that a vessel (or, presumably, any other vehicle or personnel unit) could be part of a "force" under NATO-SOFA only if some formal paper "assigned" it to a "NATO command," and that the lack of such a written assignment shows the Blue Jacket was not a part of a "force" within pertinent treaty language. The terms of the treaty do not support, but serve to refute, this contention.

The governing definitions, reviewed earlier, describe a "force" as "belonging to the land, sea or air armed services *of one Contracting Party* * * *." Article I(*a*), 4 U.S.T. at 1794 (emphasis added). Article VIII contemplates specifically and pervasively that the "forces" it governs will normally be under, part of, and identified with their respective contracting Governments, not with some merged "NATO command." And the definitions recognize that components of such forces may either be stationed more or less permanently in a receiving state "or passing in transit" from time to time. Article I (*e*).

In short, like their abandoned creation concerning the letter "N," the requirement plaintiffs propose of a documentary "assignment" lacks any basis in the relevant treaty provisions. It remains clear that the American authorities, the German tribunal, and the plaintiffs themselves were correct when all proceeded on the judgment that these claims were within the jurisdiction of the Federal Republic under NATO-SOFA.

The motion for summary judgment is granted. Judgment will be entered dismissing the complaint. So ordered.

Dated: New York, New York
July 26, 1967

MARVIN E. FRANKEL
U. S. D. J.

FOOTNOTES:

1. The libel as originally filed contained a count for the loss of the Dirk. This property-damage claim has been withdrawn from the present suit, and is before the Court in another, separate action (66 Ad. 132) to which further reference will be made below.

2. Definitions of terms in Article I include the following (4 U.S.T. at 1794):

> "(*a*) 'force' means the personnel belonging to the land, sea or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connexion with their official duties, provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a 'force' for the purposes of the present Agreement;
>
> * * *
>
> "(*d*) 'sending State' means the Contracting Party to which the force belongs;
>
> "(*e*) 'receiving State' means the Contracting Party in the Territory of which the force or civilian component is located, whether it be stationed there or passing in transit."

There is no question that the United States is a "sending State;" that West Germany is the "receiving State;" and that the plaintiffs herein are "third parties" within the terms of the Agreement.

3. Paragraph 4, immaterial here, is a waiver of claims by the contracting Governments against each other for injuries or deaths suffered by members of their armed forces in the course of official duties.

4. See S. Exec. Rep. No. 1, 83d Cong., 1st Sess., pp. 13-14 (1953):

> "IX. CLAIMS PROCEDURES
>
> "The procedures for settling civil claims seem to the committee to be fair and just and calculated to reduce to a minimum

the friction that almost inevitably arises from torts committed by members of the force or civilian component against members of the local population. In the case of torts committed in the performance of duty, the local citizen who is injured proceeds against his own government exactly as he would if the injury had been caused by a member of his own government's armed forces. His own government settles the claim and is committed to pay 25 percent of the damages (thus safeguarding against excessive settlements) while the sending state whose national is at fault pays the other 75 percent. There is some reason to expect that such a procedure will result in smaller settlements than adjudication by American claims officers, with greater satisfaction of the claimants. Experience has shown that local officials are likely to take a more moderate view than Americans of monetary damage.

"In the case of tortious acts or omissions not done in line of duty, the person damaged can sue the person responsible. But, because it was felt that most soldiers would not be able financially to pay substantial damages, the person wronged also is given an additional remedy through his own government.

"It is important to note that these protections for local populations are reciprocally available to American citizens who may be injured by foreign troops in the United States."

5. In the omitted remainder of the sentence, reference is made to a 1956 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany upon which plaintiffs place heavy and mistaken reliance.

6. There might be substantial ground for holding that the adjudications in Germany, under a jurisdiction plaintiffs invoked, bar the present suit on grounds of *res judicata*. Cf. *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66 (1939); *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938); *Hilton* v. *Guyot*, 159 U.S. 113 (1895); *Regierungspraesident Land Nord. W.* v. *Rosenthal*, 17 A.D. 2d 145, 232 N.Y.S. 2d 936 (1st Dep't 1962). As noted just below in the text, responsible American authorities concurred in the view of the German tribunal that the cases were properly before it under NATO-SOFA. Even apart from that concession, it would appear that a German ruling either way would have been binding upon the United States under paragraph 5(*c*), Article VIII, of the Agreement, which, to repeat it, states that a "settlement" or "adjudication" "by a competent tri-

bunal of the receiving State," granting or denying payment, "shall be binding and conclusive upon the Contracting Parties."

In its argument supporting the present motion, the Government has verged upon, but not explicitly asserted, arguments of *res judicata* or collateral estoppel. In view of the court's ruling against plaintiffs on the jurisdictional point, it becomes unnecessary to reach a final conclusion on this subject.

7. "Obviously, if the Contracting Parties *agree* that an individual is not a member of a force, this appellant is without recourse in the courts." *Id.* at 922 n.10.

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 17—September Term, 1968

Argued: September 9, 1968 Decided: October 1, 1968

Docket No. 31862

ALFRED M. SHAFTER, as next friend of the dependents and next of kin of JOAQUIN FARINA MUNIZ, and for such other persons as may be similarly situated, such as dependents and next tof kin of GEORG JOSEPH KOSTKA, GERHART RUDI RICHARD KLATT, DIETER AHRENS, KOCH LOTHAR LUDWIG WILMES and GUNTHER SCHIKULLA, and KARL-HEINZ WEINHOLD,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant and Third-Party
Plaintiff-Appellee,

and

ALFRED M. SHAFTER, as next friend of the defendants, etc., et al.,

Third-Party Defendants.

Before Lumbard, Chief Judge, Smith and Anderson, Circuit Judges.

Plaintiffs appeal from an order of the United States District Court for the Southern District of New York,

Marvin E. Frankel, J., entered July 27, 1967, dismissing their complaint for damages brought under the Public Vessels Act, 46 U.S.C. § 781, on the ground that the suit is barred by the terms of the North Atlantic Treaty Status of Forces Abroad Agreement of June 19, 1951, 4 U.S.T. 1792.

Affirmed.

Jacob Rassner, New York, N.Y. (George G. Kilarjian and Francis J. Nicosia, on the brief) for appellants.

Bruno A. Ristau (Edwin L. Weisl, Jr., Assistant Attorney General, Robert M. Morgenthau, United States Attorney for the Southern District of New York, John C. Eldridge and Philip A. Berns, Attorneys, Department of Justice, Washington, D. C., on the brief) for appellee.

Per Curiam:

We affirm for the reasons stated in Judge Frankel's opinion, reported at 273 F. Supp. 152 (1967).

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 884

ALFRED M. SHAFTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of the court of appeals (App. 15a-16a)[1] is not reported. The opinion of the district court (App. 1a-14a) is reported at 273 F.Supp. 152.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1968 (Pet. 1a-2a). The petition for

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[1] "App." refers to the appendix to petitioners' brief in the court of appeals.

a writ of certiorari was filed on December 28, 1968. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the North Atlantic Treaty — Status of Forces Agreement provides the exclusive remedy for personal injury and death resulting from a collision in German territorial waters between a German vessel and a United States Naval vessel.

TREATY INVOLVED

Article VIII of the North Atlantic Treaty—Status of Forces Agreement of June 19, 1951, T.I.A.S. 2846, 4 U.S.T. [2] 1792, 1806-1808, provides in pertinent part as follows:

> 5. Claims * * * arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting Parties, shall be dealt with by the receiving State in accordance with the following provisions:
>
> *(a)* Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State with respect to claims arising from the activities of its own armed forces.

(b) The receiving State may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by the receiving State in its currency.

(c) Such payment, whether made pursuant to a settlement or to adjudication of the case by a competent tribunal of the receiving State, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Contracting Parties.

(d) Every claim paid by the receiving State shall be communicated to the sending States concerned together with full particulars and a proposed distribution in conformity with sub-paragraphs *(e)* (i), (ii) and (iii) below. In default of a reply within two months, the proposed distribution shall be regarded as accepted.

(e) The cost incurred in satisfying claims pursuant to the preceding sub-paragraphs and paragraph 2 of this Article shall be distributed between the Contracting Parties, as follows:—

(i) Where one sending State alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 per cent. chargeable to the receiving State and 75 per cent. chargeable to the sending State.

* * * *

(h) Except in so far as sub-paragraph *(e)* of this paragraph applies to claims covered by paragraph 2 of this Article, the pro-

visions of this paragraph shall not apply to any claim arising out of or in connexion with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply.

STATEMENT

The petitioners are a surviving German crew member and the next of kin of six crew members (five German nationals and one Spanish national) of a German coastal vessel, the M/S DIRK. The vessel sank in February 1964 in the territorial waters of the Federal Republic of Germany after a collision with the USNS BLUE JACKET. The six crew members perished as a result of the collision; the surviving crew member suffered injuries (App. 1a).

The USNS BLUE JACKET was a naval cargo ship transporting supplies to the United States armed forces stationed in the Federal Republic of Germany pursuant to the North Atlantic Treaty ("NATO")[2] (App. 9a). The North Atlantic Treaty—Status of Forces Agreement, T.I.A.S. 2846, 4 U.S.T. [2] 1792 ("NATO-SOFA"), which defines the rights, privileges and obligations of the military forces of one NATO state stationed in or passing through the territory of another NATO state, contains a comprehensive scheme

[2] T.I.A.S. 1964, 63 Stat. [2] 2241. The Federal Republic of Germany acceded to NATO by a protocol on October 23, 1954, T.I.A.S. 3428, 6 U.S.T. [5] 5707, and to NATO-SOFA by a supplementary agreement on August 3, 1959, T.I.A.S. 5351, 14 U.S.T. 531.

for the adjudication and settlement of claims for damages caused by the members of the United States forces in the territory of the Federal Republic of Germany. Essentially, such claims must be asserted, in the first instance, before an administrative agency of the Federal Republic; review of the administrative decision can be had in the German law courts. If a claimant is successful, the Federal Republic pays the administrative award or judgment, but the United States ultimately reimburses the Federal Republic for 75 percent of the amount so paid.[3]

Following the collision, all of the petitioners filed administrative claims against the Federal Republic with the appropriate German administrative agency (the "Defense Cost Office" in Bremen) in accordance with NATO-SOFA (App. 7a). The German agency denied the claims, holding that the collision was caused solely by the faulty navigation of the German vessel *(ibid.)*. None of the petitioners appealed these adverse decisions, as permitted by German law, and they became final (App. 8a).

Thereafter, the petitioners instituted the present suit against the United States under the Public Vessels Act, asserting the same claims which had been earlier rejected by the German Defense Cost Office. On the government's motion, the district court dismissed the suit on the ground that the comprehensive

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[3] 10 U.S.C. 2734a authorizes the Secretary of Defense to pay to foreign governments the agreed pro rata share of the cost of claims settled by those foreign governments and arising from damages caused by members of the United States armed forces present in such foreign countries pursuant to NATO.

claims provisions of NATO-SOFA provided the exclusive remedy for these death and personal injury claims (App. 6a). The court of appeals affirmed *per curiam* (App. 15a).

ARGUMENT

The petition raises the single question whether the courts below correctly dismissed the petitioners' suit under the Public Vessels Act, 46 U.S.C. 781, for personal injury and death on the ground that their sole remedy was a proceeding under the Status of Forces Agreement in Germany. It is clear that the claims which petitioners allege are cognizable under the SOFA. Paragraph 5*(h)* of Article VIII thereof provides:

> [With immaterial exceptions,] the provisions of this paragraph shall not apply to any claim arising out of or in connexion with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, *other than claims for death or personal injury* to which paragraph 4 of this Article does not apply.[4] [Emphasis added.]

The petitioners contend (Pet. 10-19), however, that NATO-SOFA ought not to be interpreted to vest exclusive jurisdiction in the state where our forces are operating over maritime personal injury and death claims involving a United States Naval vessel. Relying on the facts that NATO-SOFA excludes maritime

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[4] Paragraph 4, not pertinent here, contains a mutual waiver of claims by the signatory states for injuries suffered by, or deaths of, members of their military forces.

property claims from the coverage of the claims article, and on certain portions of the negotiating history of the treaty, petitioners urge that the courts should read paragraph 5*(h)* of Article VIII of NATO-SOFA as excluding all maritime claims.

The language of the treaty, however, refutes petitioners' position. The necessary implication of the statement in paragraph 5*(h)* that its provisions shall not apply to claims arising out of ship operations "other than claims for death or personal injury" is that they do cover the latter category. Moreover, as the court below pointed out (App. 5a), petitioners' proposed reading of paragraph 5*(h)* would also prevent uniform treatment of compensation claims arising in a given NATO country—which the treaty was designed to accomplish [5]—and would encourage forum shopping.[6] In short, as the district court stated (App. 5a-6a):

> There is no doubt that the later provisions of NATO-SOFA are to be harmonized so far as possible with those of the Public Vessels Act. It seems equally clear that the specific and detailed remedial apparatus under the later treaty should

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[5] See S.Exec.Rep. No. 1, 83d Cong., 1st Sess., pp. 13-14 (1953).

[6] Petitioners' further claim (Pet. 7-9) that the Constitution precludes a repeal of an Act of Congress by a subsequent treaty. Article VI of the United States Constitution provides, however, that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land * * *." See also *Hijo* v. *United States*, 194 U.S. 315, 325; *Z.&F. Assets Realization Corporation* v. *Hull*, 114 F.2d 464, 470-471 (C.A.D.C.), affirmed, 311 U.S. 470.

be deemed to substitute *pro tanto* for the general consent to suits under the statute. In giving its assent to NATO-SOFA, the Senate noted specifically both the benefits and the burdens of the jurisdictional agreement. * * * And it was recognized that the United States was undertaking the same jurisdictional burdens, and procuring the same benefits, for American citizens injured by foreign NATO forces stationed in this country.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 331865 456